

Protection of Personality Rights in Slovakia¹

Jozef Štefanko

Abstract: *This paper introduces the Slovak law of protection of personality through the optics of private law, in particular its general and core regulation in the Slovak Civil Code. It ponders the constitutional underpinnings and contexts thereof as well as their mutual communication and evaluation of conflicting constitutional principles. The paper also introduces the current legal discourse of this area of law in Slovakia and discusses the issue of monetary satisfaction for non-pecuniary loss of surviving relatives, sometimes referred to as bereavement damages, and tackles manifold legal questions this issue brings about to the legal practice. It concludes that the Slovak substantive law is in a need for a systematically coherent system of liabilities and compensations in cases of personal injuries in a broader sense.*

Key Words: *Civil Law; Personality Rights; Personal Injury; Remedies; Monetary Satisfaction; Compensation; Liability; Bereavement Damages; Car-accident Insurance; the Slovak Republic.*

Introduction

A human being's personality is a complex and multi-faceted notion. It covers various aspects of physical and psychical nature channelled through his or her pursuit of this life, sometimes materialised to the outside world and many times attached only to one's emotional sphere, all together amounting to a unique individual. Infringement of these various aspects can also be very diverse, just as diverse is the actual possibility to adequately remedy such infringements. Sometimes a wounded body can be well recovered (especially in cases of effective medical assistance), sometimes a wounded soul can carry on with life stronger through obtaining some sort of satisfaction and many a time a hurt personality re-

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mains tainted for a long time, notwithstanding any action taken by others or the law. Alas, interfering with people's personalities and coping with consequences thereof is a natural element of human life. For a legal order, it is a highly complex and sensitive policy issue to take into account said aspects of people's individuality and to decide which of those should be awarded heightened protection and in what manner the encroachment upon these rights should be remedied. Hence, a sensitively chosen balance between the general necessity to protect one's personality on the one hand and conflicting principles fundamentally impeding its inviolability (right to information, freedom of artistic expression, proportionality of punishment and compensation, aim not to hamper scientific or cultural development etc.) on the other hand amounts to one of the features of a country's social identity as well as its place in the world of protected aspects of human nature.

The Slovak law, probably just as any legal order, deals with the multiplicity of issues relating to protection of one's personality by providing for regulation thereof in various sources of law pertaining to various branches of law of public as well as of private law nature, spanning from constitutional law and international conventions (most notably those dealing with human rights), criminal law and administrative law to the voluminous private law regulation.

Having in mind the fundamental nature of those issues and respecting the diversity of concrete matters that the overarching notion of a man's personality may consider, this paper will unfold around two basic focal points. Firstly, it aims to introduce the Slovak law of protection of personality through the optics of private law, in particular its general and core regulation in the Slovak Civil Code.² Naturally, in this regard we cannot omit the constitutional underpinnings and contexts since these are in constant communication with the civil law regulation and a great share of litigation in protection of personality rights thus touches upon the evaluation of conflicting constitutional principles. Secondly, the paper will introduce a current legal discourse and thus discuss a highly topical issue in the Slovak legal practice as well as legal discourse as such – monetary satisfaction for non-pecuniary loss of surviving relatives, sometimes referred to as bereavement damages.

² See *Act No. 40/1964 Coll. Civil Code, as amended* (hereinafter referred to as the "Civil Code 1964").

1 Protection of personality rights in the Slovak private law

1.1 System of sources of law of protection of personality rights

Since the complex notion of human personality touches upon fundamental issues of humanity and inviolability of an individual which is in many ways constitutionally and internationally guaranteed phenomenon, the hierarchy of the sources of law on national level has to indeed start with international treaties dealing with some of those issues. The Constitution of the Slovak Republic specifically asserts precedence of most of such international instruments over national legislation.³ Even though there is a great number of international treaties that one could count among instruments dealing with human rights, the most important and influential ones, and it holds true also when it comes to the national level (given the extent of doctrinal discourse and references in the judicial practice), would be the following:⁴

- ✚ the United Nations International Covenant on Civil and Political Rights (1966);
- ✚ the United Nations International Covenant on Economic, Social and Cultural Rights (1966);
- ✚ the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- ✚ the United Nations Convention on the Rights of the Child (1989);
- ✚ the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (1997);
 - ✚ the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin (2002); and
- ✚ the European Social Charter (1961).

One could argue that these instruments are too general in nature and the protected values they encompass need specific interpretation in actual situations. True, most of these values are similarly established and further explained in the Slovak legal order on various levels, however,

³ Cf. Article 7 of the *Act No. 460/1992 Coll. Constitution of the Slovak Republic, as amended* (hereinafter referred to as the "Constitution 1992").

⁴ In addition, there is a long list of international treaties that are focused on particular branches of private law, such as the protection of intellectual property. See e.g. FRINTA, O. *Personality Rights in Central and Eastern Europe: The Czech Republic. Opolskie Studia Administracyjno-Prawne*. 2013, vol. 11, no. 3, p. 28. ISSN 1731-8297.

these international instruments very often serve as interpretative yardsticks⁵ and the judicial mechanism they may employ⁶ would thus be an ultimate safeguard of the protection of given values. Ultimately, accounting for the judicial practice of the European Court of Human Rights as well as other international courts is seen as a constitutional imperative for the domestic judiciary.⁷

The Constitution of the Slovak Republic of 1992 (hereinafter referred to as the “Constitution 1992”) provides for general protection of various aspects of human personality. Namely, it guarantees everyone’s right to life and maintains that life is worthy of protection even before birth of an individual (Article 15 of the Constitution 1992). Moreover, according to the Article 16 of the Constitution 1992, a person as well as its privacy is inviolable. Everyone also has the right of preservation of human dignity, personal honour, good reputation, protection of the name, protection against illegal infringements of private and family life and protection of personal data (Article 19 of the Constitution 1992).⁸ The Constitution 1992 also provides for a protection of personal writings and data (Article 22 of the Constitution 1992). On the other hand, there is a fundamental freedom guaranteed to every individual, which necessarily may interfere with those above-mentioned rights, namely the freedom of expression and the right to information (Article 26 of the Constitution 1992). Specifically this clash of values would be the key interpretative subject matter of the private law conflict and litigation.⁹

⁵ The Slovak judiciary would often skew the reading of national legislation while applying provisions of the international instrument. See e.g. *Decision of the Supreme Court of the Slovak Republic Ref. No. 4 Cdo 177/2005* [2007-05-31] (preferring the Article 5 (5) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* before national legislation while awarding satisfaction for wrongful imprisonment).

⁶ This is especially the case of the case law of the European Court of Human Rights. In relation to protection of personality rights in Slovakia cf. e.g. *Case of Marônek v. Slovakia* [2000-04-19]. Judgement of the European Court of Human Rights, 2000, Application No. 32686/1996; and *Case of Feldek v. Slovakia* [2000-07-12]. Judgement of the European Court of Human Rights, 2000, Application No. 29032/1995.

⁷ See e.g. *Decision of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 284/2012* [2013-06-06] (deriving this conclusion from the Article 1 (2) of the Constitution 1992 specifically in the personality rights environment).

⁸ This provision is deemed the general constitutional frame of the protection of personality. See *Decision of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 284/2012* [2013-06-06].

⁹ The judiciary (national as well as international) then strives for reaching a proportionate and mutually just protection of conflicting values (the Constitutional Court of the Slovak Republic repeatedly argues that the principle of just equilibrium should govern such con-

Constitutional guarantees are further elaborated in the lower-level legislation, most importantly the laws, out of which the key legislation is the Civil Code of 1964, which in its Sections 11 – 16 introduces a general and brief rule on protection of personality, points out restrictive licences to use certain aspects of one's personality (official, news, artistic) and sets means of protection of the personality rights which are an injunction, restitution of the unlawful infringements and provision of satisfaction to the aggrieved party. This may be provided in a monetary form and very often this is the most sought for remedy. Furthermore, there are sectional laws that also cover issues of protection of personality rights. There are e.g. acts relating to regulation of print and audio-visual broadcasting¹⁰ that provide for the right of correction, response or additional announcement in cases of publishing or broadcasting incorrect or defamatory information on a particular person. The Personal Data Protection Act of 2018,¹¹ implementing the General Data Protection Regulation,¹² follows the general stream of protection given to personality with a specific focus on disclosing a person's identity. Finally, there are several acts relating to intellectual property rights which also pertain to human's personality, yet are a rather specific set of issues that are thus not dealt with in this paper.

Any deliberation on the contemporary Slovak law would be incomplete without mentioning of the standing judicial practice which can be only to a limited extent referred to as case law. Although Slovakia is deemed a part of the continental (civil) law family, the relevance of judicial practice in recent years has been growing steadily. First of all, the

flict). See e.g. *Decision of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 362/09* [2009-10-15], which and for that matter derives fact-sensitive tests of proportionality. See e.g. the test of proportionality of the freedom of expression as opposed to personality protection in the media environment as applied e.g. by the *Decision of the Constitutional Court of the Slovak Republic Ref. No. II. ÚS 152/08* [2009-12-15], Sections 30 et seq.

¹⁰ See Sections 7 – 10 of the Act No. 167/2008 Coll. on *Periodical Press and Agency News and on Amendments to Certain Acts (Press Act)*, as amended, and Section 21 of the Act No. 308/2000 Coll. on *Broadcasting and Retransmission and on Amendment of the Act No. 195/2000 Coll. on Telecommunications*, as amended.

¹¹ See Act No. 18/2018 Coll. on *Protection of Personal Data and on Amendments to Certain Acts*.

¹² See *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation)*. OJ EU L 119, 2016-05-04, pp. 1-88; whereas the interplay between the General Data Protection Regulation and the national legislation on protection of personality is prone to be highly topical with the in force coming of the regulation.

case law of the European institutional courts (European Court of Human Rights, Court of Justice of the European Union) is generally binding on the Slovak courts with regard to the specific policies and issues they are applying and interpreting since those sources are precedential to the Slovak law. But other judicial argumentation of national level is of no less importance nowadays, which has found its way also to the written procedural law. According to the Article 2 (2) of the General Principles of the Civil Procedure Code of 2015, *“Legal certainty is a state in which everyone may legitimately expect that his or her lawsuit will be decided according to the settled judicial practice of the highest judicial authorities; [...]”*. And more, according to the Section 220 (3) of the Civil Procedure Code of 2015, *“If a court deviates from a settled judicial practice, the reasons of the judgement also include the reasons for such deviation.”* The deciding Slovak courts are thus under a legal duty to take into account the standing judicial practice, even though it is not deemed a source of law, but with reference to general principles of protection of legitimate expectations and a right to a fair trial. In addition, it has been long established practice that the Slovak courts would in deciding their cases regard the Czech judicial practice as well, since the substantive law has long had common traits and heritage and dubious issues have been discussed with argumentation applicable in both countries. In a branch of private law like protection of personality rights, the judicial practice is indeed relevant, since the specific substantive law is characterised with a high level of generality and thus needs to be broken down to particulars.

1.2 Features of personality rights relevant for their application and interpretation

When it comes to the features that define the law of protection of personality rights, several characteristics¹³ stand out that may serve as interpretative and application props in concrete cases. The personality rights are general in nature, i.e. they are pertaining a priori to everybody. They are of immaterial nature and thus relate just to the personality of the individual. Furthermore, they are of absolute nature which means that everyone has to respect them. Those rights are attached always to

¹³ The enumeration is based on the analysis of Imrich Fekete. See FEKETE, I. Občiansky zákonník: Veľký komentár [The Civil Code: A Great Commentary]. In: *Epi.sk – Ekonomické právne informácie* [online]. 2018, § 11 [cit. 2018-01-03]. Available at: <http://www.epi.sk/eurokodex-komentar/Eurokodex-komentar-zakona-c-40-1964-Zb.htm?fid=674431&znenie=2016-07-01>.

a unique individual and are non-transferable which is being marked with the notion of *ius personalissimus*. Moreover, they have non-commercial and non-patrimonial nature. This, among others, means that the rights cannot be subject to negative prescription or time-lapse. And, finally, these rights exist with the existence of a natural person, from the conception to death upon which they extinguish.¹⁴

1.3 Protection of personality

Now we turn to the question in what manner is the protection of personality afforded to a concerned individual. First of all, the protection is directed against infringement of the right including endangering of those rights, i.e. the consequences are not pivotal, but the unlawful action has to have a potential for infringement.¹⁵ If the wrongdoing action has taken place, culpability of the wrongdoer is irrelevant, unlike in cases where there have been incurred damages attributable to the wrongdoer. The infringement's upshot for its possible remedying would thus undergo the test of legitimacy and the legality of the infringement would be established. The notion of legality is the only and general proviso to the principle of protection of personality and very often is being established by invoking constitutional rights of the actor.

Once the illegal infringement of one's personality is established, the aggrieved party may resort to basically four remedies,¹⁶ i.e. (1) relinquishment of illegitimate infringement of the right to protection of one's personality, (2) removal of consequences of such infringements, (3) obtaining appropriate satisfaction (which is generally a non-monetary performance, usually a public apology), and if the dignity of a natural person or its reputation in society has been substantially devaluated, he or she may claim (4) obtaining monetary satisfaction. In addition, the Civil Code

¹⁴ This, however, does not preclude relatives of the deceased affected party to assert protection of the personality of this person post mortem, based on a specific statutory provision. See Section 15 of the Civil Code 1964; for complex overview see especially KEREČMAN, P. Postmortálna ochrana osobnosti pred neoprávnenými zásahmi médií – 1. časť [Post-mortal Protection of Personality against Unjustified Interferences of the Media – Part 1]. *Justičná revue*. 2010, roč. 62, č. 2, pp. 179-205. ISSN 1335-6461.

¹⁵ See *Nejvyšší soud o občanském soudním řízení v některých věcech pracovněprávních, občanskoprávních a rodinnoprávních (Sborník III)* [The Supreme Court on Civil Procedure in Some Labour Law, Civil Law and Family Law Matters (Collection III)]. Praha: SEVT, 1980, pp. 176-178 and 199-201; similarly see *Decision of the Supreme Court of the Slovak Republic Ref. No. 3 Cdo 137/2008* [2010-02-18] (not requiring the affected party by infringement of his or her privacy to prove a defamatory effect thereof).

¹⁶ Pursuant to the Section 13 of the Civil Code 1964.

of 1964 recognises also the aggrieved party's right to damages, if patrimonial loss was incurred, in a causal link with the infringement of the personality right.¹⁷ In that case, all other conditions for attribution of liability have to be met (most notably the culpability of the wrongdoer).

1.4 Protected values (personality)

The key issue in determining the extent of protection of one's personality in the Slovak private law is to outline the very notion of personality or its elements that the legal order insists on protecting. The Civil Code of 1964 provides for a rather general outline of this notion, yet points out the pivotal elements of the personality: "*A natural person has the right to protection of its personality, in particular of its life and health, civic honour and human dignity as well as of its privacy, name and expressions of personal nature.*"¹⁸ Thereby, it is clear that the physique (life, health, bodily integrity) is the dominant protected value of the personality. Furthermore, the elements of individuality such as name, honour, dignity or personal freedom are provided with civil law protection. The internal world of an individual pertains to the protection-worthy personality (e.g. privacy, psyche, healthy environment). But also the expressions of one's personality to the outside world are protected (i.e. writings of personal nature, portraits, images, video and audio recordings). In a similar vein, we count among the elements of personality also the interaction and association of a person with others, which is substantiated in his or her right to petition, to share information etc. However, some rights, although constitutionally guaranteed, are not deemed personal¹⁹ and thus cannot be protected by means of civil law protection of personality rights.

For a long time, the typical case of litigation of personality rights has been in relation to infringement of a person's standing and dignity through defamatory public utterances and claims of respective remedies from publisher of those statements.²⁰ Although still an important subject

¹⁷ For details see Sections 420 et seq. of the Civil Code 1964.

¹⁸ See Section 11 of the Civil Code 1964.

¹⁹ E.g. the right to an expedient trial for which see *Decision of the Supreme Court of the Czech Republic Ref. No. 30 Cdo 3125/2006* [2007-11-29].

²⁰ See *Nejvyšší soud o občanském soudním řízení v některých věcech pracovněprávních, občanskoprávních a rodinněprávních (Sborník III)* [The Supreme Court on Civil Procedure in Some Labour Law, Civil Law and Family Law Matters (Collection III)]. Praha: SEVT, 1980, p. 171; see also VOZÁR, J. Ochrana osobnosti [Personality Protection]. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákoník I: § 1 - 450: Komentár* [Civil Code I: § 1 - 450: Commentary]. 1. vyd. Praha: C. H. Beck,

matter, in the recent decade, the aspect of person's personality comprising the pursuit of happiness within family ties and family life which may have been severed by a wrongdoing of a person has gained on prominence and ever more finds its place in the Slovak courtrooms. Therefore, we now turn to this highly topical set of questions.

2 Monetary satisfactions for surviving relatives (bereavement damages)

In a society where immaterial values are becoming much more appreciated than material goods and time spent with one's family members counts among the more important features of a human life and contributes to the overall well-being of an individual and his or her individuality, it is natural that the private law strives for protection of this value. It is, however, very difficult to draw a just and justifiable framework of such protection with appropriate means thereof. The very issue of what kind of infringement into this aspect of one personality attributable to a certain wrongdoer should be remedied or even compensated is a difficult one. Should it only be causing of death of a family member, or lesser infringements, such as long-term health disablement, impeding a full-fledged family life, as well? But even if we agree only with the former, quite a few problematic issues remain to be resolved and determined as a policy and legal-interpretative matter. First of all, can the bereavement of the surviving family member be compensated through the law of liability for damages? Notwithstanding the answer to this question, could it be remedied through the special provisions on protection of personality and are these legal instruments mutually exclusive? If we agree on the general possibility of compensating such infringements, it is still a difficult issue how it should be calculated. And the Slovak private law, due to a relatively undetailed regulation of the system of liability in private law, raises a specific question with intense economic underpinnings, namely whether in cases of caused death of a family member in a car accident the bereavement of the survivors should be compensated through compulsory insurance against civil liability in respect of the use of motor vehicles. We will now try to elicit most pressing ones of those issues.

2015, pp. 61-66. ISBN 978-80-7400-597-8 (focusing predominantly on these issues in a current general analysis).

2.1 Liability for damages

Pursuant to the Slovak law of liability for damages, a harm caused to a person's health can be remedied in a form of a monetary compensation provided to the aggrieved party if all the prerequisites²¹ of liability are met. Along with patrimonial damage²² linked with the bodily harm, pain and suffering of the individual is compensated with a sum calculated through a statutorily established appreciation system based on medical expert statement and a statutory "table of harms".²³ This all relates to claims of a surviving victim of a wrongdoing. However, the only mentioning of compensation of relatives of a deceased person in the Civil Code of 1964 is with regard to the appropriate burial costs and the surviving dependents' support,²⁴ whereas these claims are closely connected (and thus limited in extent) with the state social security insurance system. It remains to be determined whether indirect victims of a wrongful act can be thus compensated if the harm they have suffered as a result of the wrongful act can be considered a (generally reimbursable) patrimonial damage or pain and suffering, since these would have been triggered by a primary wrongdoer. Supreme legal authorities have long held that: *"A causal link between the action of a tortfeasor and the loss incurred cannot be derived from a matter that is a consequence in itself, for which the tortfeasor is already liable. That is the case e.g. if someone suffered loss as a result of a reaction (shock) to the message about a deadly accident of other person, which had been caused by the tortfeasor and for which loss he or she is liable."*²⁵ Based on this reasoning, surviving relatives of a deceased victim of a wrongdoing are generally exempt from claiming compensation of damages as a matter of broken causal link to their harm, even if it was a medically diagnosed harm otherwise eligible to compensation by a direct wrongdoer.

²¹ These include inflicting an unlawful act, existence of patrimonial damage (or bodily harm prone to pain and suffering), causal link between those occurrences and culpability of the wrongdoer (which is presumed). See Section 420 of the Civil Code 1964. It should also be noted that the Slovak Civil Code employs a single system of liability for damages in tort as well as in contract.

²² See Sections 444 – 449a of the Civil Code 1964.

²³ See *Act No. 437/2004 Coll. on Compensation of Pain and on Compensation for Diminished Social Capability [...], as amended*, along with the Section 443 of the Civil Code 1964.

²⁴ See Sections 448 and 449 (2) of the Civil Code 1964.

²⁵ See *Decision of the Supreme Court of the Czech Socialist Republic Ref. No. 2 Cz 36/76 [1976-11-30]*.

Clearly, this conclusion is fully based on the interpretation of causality which is always a highly individual matter when it comes to certain facts and all generalizations in this regard should be made in a sensitive and restrictive manner. Still, such view is not a direct expression of the legislator's will and is susceptible to rethinking either by the judiciary or the lawmaker itself.

2.2 Protection of personality

Since it became possible to seek for a pecuniary satisfaction for infringement of personality rights, it is a legitimate issue whether also the element of personality related to the social sphere of an individual represented by ties within a family could be compensated by means of this separate legal institute, although it has been denied by the law of damages. Hence, approximately from 2005, there appears growing consensus that this possibility is at hand and the right of privacy, family and social life is just as much elements of one's personality as any other and thus should be provided with possible satisfaction in cases of infringement as well. In the words of the Supreme Court of the Slovak Republic: *"If – between natural persons – there exist social, moral, emotional and cultural relations created within their private and family life, infringement of the right to life of one of them may cause illegitimate infringement on the right to privacy of the other person. [...] In case of death of one member of a family relationship, the surviving person may suffer emotional harm in form of a shock, sorrow for the loss of a close person and of companionship (relationship) with a close person."*²⁶ One should, however, keep in mind that this issue is susceptible to undergo reinterpretation in legal practice.²⁷ Given the general possibility to remedy such infringements through the legal concept of protection of personality rights rather than through the system of liability for damages which is better equipped with legal tools to account for specifics of the infringing behaviour, especially when considering monetary remedies, it seems inevitable to resort to analogy²⁸

²⁶ See *Decision of the Supreme Court of the Slovak Republic Ref. No. 5 Cdo 265/2009* [2011-02-17].

²⁷ See analysis in DULAK, A. Nie je ujma ako škoda (alebo, keď gramatický výklad zákona nepostačuje) [Harm Is Not the Same as Damage (or, when Grammatical Interpretation of the Law Does Not Suffice)]. *Bulletin slovenskej advokácie*. 2016, roč. 22, č. 7-8, pp. 10-15. ISSN 1335-1079.

²⁸ Thus the wrongdoer liable for infringement of personality right of a survivor of a car accident should be determined on the basis of the same provisions as the person liable for damage caused within operation of a motor vehicle. See NOVOTNÁ, M. § 429 Rozsah zod-

between these two systems of private law liability, even though the legal test of each thereof slightly differs. Since this branch of law is typified with conciseness, generality and no detailed regulation of aspects of compensation, for courts that allow for compensation of the bereaved it is a rather tricky issue to determine an adequate sum of pecuniary satisfaction,²⁹ without strict guidelines and matters to consider, and thus can amount to a field of the so-called judge-made law.

2.3 Judicial practice

Indeed, it is a matter of the last decade that there has been burgeoning litigation in this field, with estimated aggregated 50 mil. EUR³⁰ at stake in legal action. A recent study of the standing judicial practice³¹ has shown that the judges have to wrestle with the absence of limits on compensation and of specification of assessment of compensation in the law. It has also been pointed out that the appellate courts set forth only vague criteria for such compensation (basically hinting to take into account various aspects of the infringement), which does not provide much guidance for the trial courts. At the same time, the lawsuits wield relatively similar and straightforward facts, whereby it is not exceedingly difficult to establish the wrongful occurrence and the liable party. In concreto, the wrongful acts leading to death of a person and the respective litigation³² includ-

povednosti prevádzkovateľa [§ 429 Measure of Liability of the Operator]. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákoník I: § 1 – 450: Komentár* [Civil Code I: § 1 – 450: Commentary]. 1. vyd. Praha: C. H. Beck, 2015, p. 1432. ISBN 978-80-7400-597-8.

²⁹ So concludes also Peter Kerecman, while calling for uniform, clear and predictable system of compensation for non-pecuniary harm. See KEREKMAN, P. Právo na primerané zadosťučinenie a náhradu nemajetkovej ujmy v slovenskom právnom poriadku (2. časť – dokončenie) [Right to an Appropriate Satisfaction and Compensation of Non-pecuniary Damages in the Slovak Legal Order (Part 2 – Completion)]. *Justičná revue*. 2006, roč. 58, č. 10, p. 1444. ISSN 1335-6461.

³⁰ See ŠORL, R. Náhrada nemajetkovej ujmy (bolestné za smútok) pozostalého príbuzného: Stav a východiská – 1. časť [Compensation for Non-pecuniary Loss of the Surviving Relative (Bereavement Damages): State of Play and Background – Part 1]. *Bulletin slovenskej advokácie*. 2017, roč. 23, č. 9, p. 7. ISSN 1335-1079.

³¹ See *ibid.* and ŠORL, R. Náhrada nemajetkovej ujmy (bolestné za smútok) pozostalého príbuzného: Stav a východiská – 2. časť [Compensation for Non-pecuniary Loss of the Surviving Relative (Bereavement Damages): State of Play and Background – Part 2]. *Bulletin slovenskej advokácie*. 2017, roč. 23, č. 10, pp. 10-21. ISSN 1335-1079.

³² For a thorough overview see ŠORL, R. Náhrada nemajetkovej ujmy (bolestné za smútok) pozostalého príbuzného: Stav a východiská – 1. časť [Compensation for Non-pecuniary Loss of the Surviving Relative (Bereavement Damages): State of Play and Background – Part 1]. *Bulletin slovenskej advokácie*. 2017, roč. 23, č. 9, pp. 10-12. ISSN 1335-1079.

ed car accidents, medical malpractice, faulty road management and liability of a ski resort. Yet these lawsuits are typified with frequent taking of emotionally painstaking testimonials from the surviving parties with low actual gain as to the measure of compensation, the procedure is relatively lengthy (almost as a rule, the final judgement is achieved on appeal). As a result, the sums awarded as satisfaction for the surviving family members vary extremely. In particular, the awards for surviving spouses spanned from 100 000 EUR to 4 000 EUR, awards for minor children from 100 000 EUR to 5 000 EUR, satisfaction for the parents of a victim spanned from 25 000 EUR to 8 000 EUR and surviving siblings were awarded sums from 15 000 EUR to 2 000 EUR.

Consequently, this whole segment of the law of protection of personality rights and, at the same time, a significant part of the civil law litigation is marked with dubious or failing legal certainty and predictability of outcome of a potential lawsuit. Therefore, the parties to a lawsuit have almost no motivation for settlement and for extra-court dispute resolution which does not in fact occur. The judiciary faces necessity to create vicarious legal constructs that would replace missing heads and measure of compensation. Moreover, unpredictability of possible awards makes insurance policymaking difficult and, therefore, much energy is spent on promoting arguments pro or contra compensation and less on the actual economy of the matter. Thus most of the actors call for a transparent system of satisfaction for the bereaved subjects, i.e. legislating on tangible criteria of calculation of the awards or providing unequivocal lump sums for specific classes of surviving parties.

2.4 Compulsory insurance against civil liability in respect of the use of motor vehicles

An extremely discussed issue, although materially a vicarious one, which found its way even to the gates of the European Union courtroom, is the question whether the award of a sum for bereaved subjects due to the infringement of the personality right is or should be covered by the compulsory insurance against civil liability in respect of the use of motor vehicles. Since fatal car accidents are the most frequent causes of severing of family ties in litigation and since the insurance companies as “deep pocket” defendants have higher propensity to face a lawsuit (and indeed are prone to face higher awards than individual defendants), it is all the more necessary to have a predictable legal standing in every corner of the legal ground.

As a matter harmonized in the European Union through its secondary legislation, compulsory insurance against civil liability in respect of the use of motor vehicles in Slovakia should meet at least the criteria of coverage set forth by the European legislation. The crucial term here being “personal injury” which the European legislation uses rather generally, without providing nuanced legal analysis of the institute,³³ or restrictively, limiting the beneficiaries of such insurance payments. For instance, the respective Article 1 (2) of the Directive 72/166/EEC³⁴ states that an “injured party” means any person entitled to compensation in respect of any loss or injury caused by vehicles. Naturally, as stated above, under the Slovak law, the infringement of one’s personality in physical or in a broader sense may trigger liability in the system of liability for damages as well as the protection of personality rights. Thus the national implementing instrument, the Act No. 381/2001 Coll. on Compulsory Contractual Insurance against Civil Liability in Respect of the Use of a Motor Vehicle [...], as amended chose to use nationally stricter language of the extent of insurance coverage of “personal injury”, stating that it shall, among others, cover “... *damage to health and expenses in the event of death...*”.³⁵ This translation and literal construction thereof evoked in applying courts the willingness to deny legal standing of insurers, as the insurance policy under the Slovak law should not have encompassed claims of infringement of personality rights.³⁶ However, as a highly disputable matter, later the issue was referred to the Court of Justice of the European Union in the case C-22/12 *Katarína Haasová v. Rastislav Petřík and Blanka Holingová* [2013-10-24], where the Court held: “Article 3(1) of Council Directive 72/166/EEC of 24 April 1972 on the Approximation of the Laws of the Member States relating to Insurance against Civil Liability

³³ This would, anyhow, be very difficult while legislating for (now) 28 Member States with varying domestic legal systems.

³⁴ See *Council Directive 72/166/EEC of 24 April 1972 on the Approximation of the Laws of Member States relating to Insurance against Civil Liability in Respect of the Use of Motor Vehicles, and to the Enforcement of the Obligation to Insure against Such Liability*. OJ EC L 103, 1972-05-02, pp. 1-4.

³⁵ See Section 4 (2) (a) of the *Act No. 381/2001 Coll. on Compulsory Contractual Insurance against Civil Liability in Respect of the Use of a Motor Vehicle [...], as amended*. It should also be noted that a later translation of the Court of Justice of the European Union (in the *Case of Katarína Haasová v. Rastislav Petřík and Blanka Holingová* [2013-10-24]. Judgment of the Court of Justice of the European Union, 2013, C-22/12) translated the Slovak legislation as “personal injury”, turning thus slightly closer to the original expression.

³⁶ See *Decision of the Supreme Court of the Slovak Republic Ref. No. 4 Cdo 168/2009* [2011-04-20]; note that the decision was accompanied by a critical dissenting opinion of one of the judges of the senate.

in Respect of the Use of Motor Vehicles and to the Enforcement of the Obligation to Insure against Such Liability, Article 1(1) and (2) of Second Council Directive 84/5/EEC of 30 December 1983 on the Approximation of the Laws of the Member States relating to Insurance against Civil Liability in Respect of the Use of Motor Vehicles, as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005, and Article 1(1) of Third Council Directive 90/232/EEC of 14 May 1990 on the Approximation of the Laws of the Member States relating to Insurance against Civil Liability in Respect of the Use of Motor Vehicles must be interpreted as meaning that compulsory insurance against civil liability in respect of the use of motor vehicles must cover compensation for non-material damage suffered by the next of kin of the deceased victims of a road traffic accident, in so far as such compensation is provided for as part of the civil liability of the insured party under the national law applicable in the dispute in the main proceedings.” Thereupon, the issue seemed to have been settled.³⁷ However, in later litigation courts again found a way how to deny the liability of insurers, arguing that since the Court of Justice of the European Union did not expressly state that national law was in conflict with the European Union law, the national court is not required to apply its holding within the meaning derived from the Court of Justice of the European Union case law.³⁸ This decision was met with a highly critical reception in the legal practice,³⁹ but was followed by one stream of judiciary, nonetheless. The view presented by the mentioned reasoning of the Supreme Court may be deemed overturned by a recent case of the Constitutional Court of the Slovak Republic⁴⁰ which held the view professed by the Su-

³⁷ See e.g. SEDLAČKO, F. Súdny dvor EÚ: Osobnostné nároky pozostalých pri smrteľnej dopravnej nehode sú kryté povinným zmluvným poistením [Court of Justice of the EU: Personality Claims of Surviving Relatives of a Victim of a Deadly Car Accident Are Covered by the Road Traffic Compulsory Insurance]. *Bulletin slovenskej advokácie*. 2013, roč. 19, č. 11, pp. 5-6. ISSN 1335-1079.

³⁸ See *Decision of the Supreme Court of the Slovak Republic Ref. No. 3 Cdo 301/2012* [2016-03-31].

³⁹ See MANDELÍK, J. Náhrada nemajetkovej ujmy: Analýza rozsudku Najvyššieho súdu Slovenskej republiky [Compensation for the Non-material Damage: Analysis of the Judgement of the Supreme Court of the Slovak Republic]. *Bulletin slovenskej advokácie*. 2016, roč. 22, č. 9, pp. 22-30. ISSN 1335-1079.

⁴⁰ See *Decision of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 666/2016* [2016-10-16]; and its analysis in JANIDŽÁROVÁ, M. Ústavný súd SR: Náhrada nemajetkovej ujmy je krytá povinným zmluvným poistením [Constitutional Court of the Slovak Republic: Compensation of the Non-material Damage is Covered by the Motor Third Party Liability Insurance]. *Bulletin slovenskej advokácie*. 2017, roč. 23, č. 3, pp. 30-36. ISSN 1335-1079.

preme Court as constitutionally unwarranted, hinting towards the interpretative precedence of indirect effect of the relevant European Union directives, whereas the trial court is obligated to interpret the wording of the Court of Justice of the European Union's ruling in light of the whole reasoning of the decision and cannot use just restrictive construction of only the holding of the case. The insurer should thus be held liable for the infringement of the personality rights of the bereaved.

Conclusions

To conclude with, the Slovak private law boasts with rather general set of rules for protection of one's personality rights. It gives a decent possibility to take into account and to remedy numerous aspects of one's personality. Given the character of the regulation especially in the Civil Code of 1964, the litigation has to be closely tied with the case law and its research and thus the judiciary is a relevant bearer of development in this area of law. In the recent years, we are encountering a shift from no monetary compensation to allowing gradually more compensation, which is visible especially in cases of infringement of those elements of personality that relate to the right of privacy and to a family life.

Although the judiciary is equipped with means to allow a greater judicial activism and discretion in this field and the recent changes to the civil procedure even foster such attitude, in order to achieve a desirable level of legal certainty and respective efficiency of litigation on personality rights, the Slovak substantive law is in a need for a systematically coherent system of liabilities and compensation, whereby there will be no necessity for creation peculiar legal constructs or dealing with vicarious legal questions, in spite of deliberating on materially just outcomes to certain fact-patterns. The other possibility to enhance the standing legal practice in the field in question would be introducing of an effective method of processing of published judicial decisions where these are the key means of influence of the future decision-making.

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Mgr. Jozef Štefanko, PhD., LL.M.

Faculty of Law
Trnava University in Trnava
Kollárova 10
917 01 Trnava
Slovak Republic
jozef.stefanko@truni.sk